APPENDIX A

IN THE

UNITED STATES COURT OF CLAIMS

No. 155-59
(Decided January 22, 1965)

RALSTON STEED CORPORATION, ASSIGNEE OF MORGAN MANUFACTURING CORPORATION v. THE UNITED STATES

Max A. Reinstein for plaintiff, *Harold C. Havighurst* of counsel.

Sidney J. Wolf for Harry L. Lieberman, Herman C. and Nizzi B. Lieberman, and Eli J. and Jean Lieberman, Third Parties.

Julian Berman for intervenors Leo J. Schwartz and Arthur S. Freeman, doing business as Schwartz & Freeman.

Sheldon P. Migdal, with whom was *Assistant Attorney General Louis F. Oberdorfer,* for defendant. *Edward S. Smith, Lyle M. Turner* and *Philip R. Miller* were on the brief.

Before COWEN, *Chief Judge,* LARAMORE, DURFEE, DAVIS and COLLINS, *Judges.*

OPINION

DAVIS, *Judge,* delivered the opinion of the court:

Receding from an arrangement it once made to advance money to settle the federal tax liabilities of unrelated taxpayers, plaintiff now seeks to recover that sum from the Federal Government. In 1951, the Banner Bed Company and its stockholders, the Liebermans, owed federal income taxes substantially in excess of $50,000. For reasons of

his own, Morris Rubin, who owned and controlled plaintiff but was not connected with Banner or the Liebermans, decided to make available $50,000 for use in compromising these obligations of the others; he wished, though, to make sure that he would get his money back if the Government rejected or took no action on the compromise. To protect this interest, plaintiff's wholly owned subsidiary (Morgan Manufacturing Corporation)[1] handed over the money to a firm of lawyers (Schwartz & Freeman) as escrow agents, under an agreement that the money was to be used to settle the tax liability of the others, but on condition that any offer to the Internal Revenue Service was to expire on March 15, 1952, and also that if the offer was not accepted by that date, or if it was earlier rejected, the money was to be returned to the escrow agents for delivery to Morgan. An offer in compromise in the amount of $50,000 was then made by Banner and the Liebermans, stating that the money had been "borrowed" and was to be returned to Schwartz & Freeman if the offer was rejected or if no final action was taken by March 15, 1952. On the same day the escrowees sent a letter to the Service, enclosing a certified check of their own, and asking that it be returned in the same circumstances.

No action was taken by the Service for some time. In 1953, the deadline in the offer (of March 15, 1952) was eliminated with plaintiff's consent, and the Service was told that the money was to be returned to the escrow agents

[1] Plaintiff brings this action as the successor in interest of its subsidiary, Morgan Manufacturing Corporation, which was created in late 1950 and continued in business until the end of December 1951, at which time plaintiff purchased its assets. At some later date, Morgan was dissolved.

only in case of rejection. In 1957, the Service informed the several taxpayers that, to remedy technical objections, separate compromise offers would have to be made for each, in place of the lump sum offer previously tendered on behalf of all. As a result, later in the same year, separate offers totalling $50,000 were made for the individual taxpayers; Banner Bed Company (which by then was practically dead) was entirely eliminated. The funds which came from plaintiff remained on deposit for use in connection with the revised compromise offers. The plaintiff's escrow agents were aware of and approved the change and there is no reason to think that they exceeded their authority or acted contrary to plaintiff's wishes.

By the close of 1958, the Internal Revenue Service had not yet acted on the revised offers but the plaintiff, again for reasons of its own, was no longer willing to continue with the arrangement. In January 1959, the plaintiff, through its escrow agents, demanded the return of the funds. Upon refusal of its demand by the Service, plaintiff instituted suit in this court. In 1962, while the suit was pending, the Commissioner of Internal Revenue accepted the individual revised offers of compromise, subject to this court's determination that defendant was entitled to retain the funds.[2]

Two major issues are presented: (1) Does the court have jurisdiction over this action brought by a nontaxpayer to retrieve its funds deposited with the Govern-

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[2] The individual taxpayers are third-party defendants here, and Schwartz & Freeman, the escrow agents, are intervenor-plaintiffs. Banner Bed Company, the corporate taxpayer for which the compromise offer was originally made but which was later eliminated, is not a party.

ment in connection with an offer for the compromise of tax deficiencies assessed against a third party? (2) If the court has jurisdiction, does the plaintiff or the escrow agency meet the conditions under which a nontaxpayer providing such funds has the right to withdraw them?

I. *Jurisdiction*

Our general jurisdictional statute, 28 U.S.C. § 1491, confers power on this court to render judgment on "any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." Plaintiff alleges four separate jurisdictional grounds, *i.e.*, that its action is founded upon provisions of the Internal Revenue Code and the Treasury Regulations, as well as upon an implied contract with the United States, and that its suit is for liquidated damages not sounding in tort. The defendant denies that we have jurisdiction under any of these heads.

Section 7122 of the Internal Revenue Code of 1954 gives the Secretary of the Treasury (or his delegate) authority to compromise criminal and civil tax cases (prior to reference to the Department of Justice), and prescribes the procedure by which formal compromises may be effected. Section 7809 provides for the placement of funds offered in compromise in a deposit fund account, and for the return of such funds to the offeror in the event of rejection by the Secretary of the Treasury. Treasury Regulation on Procedure and Administration (1954 Code), § 301.7122-1(d)(4), states that "an offer in compromise may be with-

drawn by the proponent at any time prior to its acceptance.'"[3] Plaintiff claims entitlement to the $50,000 under these statutes and the regulation.

Nevertheless we are without jurisdiction, defendant insists, because these provisions, properly interpreted, do not grant plaintiff the rights it asserts, and therefore its claim is not in truth "founded" upon an Act of Congress or an executive regulation, as 28 U.S.C. § 1491 requires. This contention wrongly equates the issue of jurisdiction with the merits. "As frequently happens where jurisdiction depends on subject matter, the question whether jurisdiction exists has been confused with the question whether the complaint states a cause of action." *Montana-Dakota Utilities* v. *Northwestern Public Service Co.*, 341 U.S. 246, 249 (1951). See, also, *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 359 (1959). Defendant in effect advocates that a determination, on the merits, that a plaintiff does not fall within the class upon whom rights are conferred by the statute or regulation upon which his case is based necessarily entails a holding that this court was without jurisdiction *ab initio*. That is not the way to decide this court's jurisdiction—any more than it would be correct to argue that a district court was without juris-

[3] In fuller text, Treasury Regulation § 301.7122-1(d) (4) provides: "An offer in compromise may be withdrawn by the proponent at any time prior to its acceptance. In the event an offer is rejected, the proponent shall be promptly notified in writing. Frivolous offers or offers submitted for the purpose of delaying the collection of tax liabilities shall be immediately rejected. If an offer in compromise is withdrawn or rejected, the amount tendered with the offer, including all installments paid, shall be refunded without interest, unless the taxpayer has stated or agreed that the amount tendered may be applied to the liability with respect to which the offer was submitted."

diction under 28 U.S.C. § 1331, when asked to rule that a complainant had certain rights under the Constitution or other federal authority, because it ultimately held that those rights had not been given. See *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra; Bell* v. *Hood,* 327 U.S. 678, 681-82 (1946); *Levering & Garrigues Co.* v. *Morris,* 289 U.S. 103, 105 (1933); *The Fair* v. *Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913). If the plaintiff asserts that his claim "arises under" or is "founded" on federal legislation or regulation (see *United States* v. *Emery, Bird, Thayer Realty Co.,* 237 U.S. 28, 32 (1915), "to determine whether that claim is well founded," the court "must take jurisdiction, whether its ultimate resolution is to be in the affirmative or the negative." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* at 249. It is "well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." *Bell* v. *Hood, supra,* at 682. "Unsuccessful as well as successful suits may be brought" upon a federal act or regulation. *The Fair* v. *Kohler Die & Specialty Co., supra,* at 25.

These same principles have applied, and still apply, to this court, within the ambit of its limited jurisdiction. In general, a claimant who says that he is entitled to money

from the United States because a statute or a regulation grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable.[4] Where an Act of Congress (*e.g., United States* v. *Emery, Bird, Thayer Realty Co., supra,* 237 U.S. at 30-32 (1915)) or an executive regulation (*e.g., Green* v. *United States,* 376 U.S. 149 (1964) (competence of this court not questioned)) arguably confers such rights upon the claimant, the court will assume jurisdiction and decide his case on the merits, even though the defendant may ultimately prevail.[5] See *e.g., South Puerto Rico Sugar Co. Trading Corp.* v. *United States,* Ct. Cl., 378-61, decided July 17, 1964, slip op., pp. 6-7, 23, 334 F. 2d 622, 626-37. *Cf. United States* v. *Ohio Oil Co.,* 163 F. 2d 633, 635-36, 642 (C.A. 10, 1947), *cert. denied,* 333 U.S. 833 (1948); *Clapp* v. *United States,* 127 Ct. Cl. 505, 509-11, 117 F. Supp. 576, 578-79 (1954); *Crain* v. *United States,* 114 Ct. Cl. 94, 183-85, 84 F. Supp. 876, 880-81 (1949). In this instance, there is no doubt that plaintiff, as well as the intervening escrow agents, have an arguable case, both with respect to Sections 7122 and 7809 of

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[4] On the qualification of non-frivolity and substantiality, see *Montana Catholic Missions* v. *Missoula County,* 200 U.S. 118, 130 (1906); *The Fair* v. *Kohler Die & Specialty Co., supra,* at 25; *Levering & Garrigues Co.* v. *Morrin, supra,* at 105-06; *Bell* v *Hood, supra,* at 682-83; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* at 249.

[5] Where an action rests upon a statute or regulation, that particular enactment need not contain a specific provision permitting a suit for money; our general jurisdictional statute, 28 U.S.C. § 1491, serves the purpose. *Simon* v. *United States,* 113 Ct. Cl. 182, 190-91 (1949).

the Code and under Section 301.7122-1(d)(4) of the Treasury Regulations.[6]

Like reasoning sustains the alternative point that this court has jurisdiction on the basis of a contract implied in fact between plaintiff (or the escrow agents) and the Treasury Department. When an action is founded on an Act of Congress or an executive regulation, as this one is, there of course need be no implied agreement with the United States as an independent ground for jurisdiction. *E.g., Crain* v. *United States*, 114 Ct. Cl. 94, 184, 84 F. Supp. 876, 880 (1949). However, since we shall find it necessary to consider the contract claim on the merits, we must also pass on this additional ground for jurisdiction. Both plaintiff and the escrowees assert that, when they tendered $50,000 to the Collector of Internal Revenue in connection with the taxpayers' compromise offer, they stipulated certain conditions under which those funds were to be returned. When the Government accepted the funds, they claim, it in effect accepted this conditional offer, thus

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[6] In *United States* v. *Babcock*, 250 U.S. 328 (1919), cited by defendant, it was held that the Court of Claims lacked jurisdiction because Congress had specifically provided that the jurisdiction of the Treasury Department over the claim in issue was exclusive and that its decision was to be final. There is no such exclusionary provision in this case. In *Roden Coal Co.* v. *United States*, 95 Ct. Cl. 219, 231 (1941), *cert. denied*, 317 U.S. 636 (1942), plaintiff, in claiming damages for injury to his property caused by the defendant's dredging operations, relied on a Congressional Act providing for maintenance of the waterway being dredged. The court seems to have held that plaintiff did not even arguably make a case that that statute gave any right to monetary relief; or possibly the opinion may have inadvertently used jurisdictional language in ruling that the plaintiff failed to state a claim on the merits under that piece of legislation.

creating a contract implied in fact. By failing to return the money upon request, the defendant (it is said) breached a contractual condition. If sustained, these factual allegations would arguably show an actual contract between the plaintiff (or the agents) and defendant; the court therefore has jurisdiction to decide the issue. In a case with less indicia of an actual consensual transaction, *Kirkendall* v. *United States*, 90 Ct. Cl. 606, 31 F. Supp. 766 (1940), we held that, when the Government improperly seized funds of the plaintiff and applied them to the tax indebtedness of a third party, this court had jurisdiction and could allow recovery under a contract implied in fact. *Catalina Properties, Inc.* v. *United States*, 143 Ct. Cl. 657, 660 (1958), distinguished *Kirkendall* on the ground that the defendant had not in fact received any funds belonging to that plaintiff. Here the Government received, and still possesses, money which came from the plaintiff; in addition, we have these complainants' assertion of an actual consensual transaction. *J. C. Pitman & Sons* v. *United States*, Ct. Cl. No. 32-59, decided May 10, 1963, 317 F. 2d 366, also cited by defendant, turns on that plaintiff's status as a volunteer rather than upon any jurisdiction determination; the decision went to the merits. At in *J. C. Pitman & Sons*, the court here has a valid jurisdictional basis on which to proceed, although we rule in the end that plaintiff and the intervenors are not entitled to recover.[7]

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[7] Plaintiff also contends, on the basis of the language in 28 U.S.C. § 1491, that this court possesses jurisdiction in any suit for liquidated or unliquidated damages not sounding in tort. Since we have jurisdiction under the three grounds previously discussed, we need not pass on this question. As indicated in footnote 12, *infra*, the result on the merits would be no different under this fourth head of jurisdiction.

As its last assault on jurisdiction, the defendant cites *United States* v. *Sherwood*, 312 U.S. 584, 588 (1941), for the position that in any event this court lacks authority over a suit against the United States when, as a prerequisite to recovery, it would have to decide the rights of private parties *inter se*. But plaintiff's claim against the Federal Government, as founded upon statutes and the Treasury Regulation, requires no determination of the rights of private litigants among themselves. Furthermore, in *Sherwood* the complainant was merely a judgment creditor seeking to recover against the United States for breach of the latter's contract with the judgment debtor. Here, plaintiff and the escrowees assert a direct relationship with the defendant and the latter is not simply in the position of a garnishee. If plaintiff or its agents have an implied contract with the United States, this court can determine the rights of these contracting parties without necessarily determining the rights of the other private litigants. The dictum in the *Sherwood* opinion pertains only to those cases where this court cannot enter judgment against the Government without first making a binding *adjudication* of the rights of one private person against another. The Supreme Court did not say or intimate that this court can never take account of the rights of private persons *inter se*. It has often done that in deciding a claim against the United States.

II. *Merits*

Of the two provisions of the Internal Revenue Code on which this claim is founded, it is more obvious that Section 7122 does not, expressly or impliedly, grant any right to recover the $50,000. That section merely authorizes formal compromises and prescribes certain procedures not now

relevant; nothing in it deals with the deposit or return of monies. Section 7809 is more pertinent since it provides for the special deposit of sums offered in compromise and that "upon the *rejection* of any such offer, the Secretary or his delegate shall refund to the *maker of such offer* the amount thereof" (emphasis added). Most relevant of all is the Treasury Regulation, footnote 3, *supra*, which declares that "an offer in compromise may be withdrawn by the *proponent* at any time prior to its acceptance" (emphasis added). We discuss the regulation first, then section 7809.

We assume, without deciding, that the term "proponent" covers certain classes other than the taxpayer. The regulation seems deliberately to use "proponent" instead of taxpayer; the official form for an offer in compromise (Form 656) also seems to use "proponent" as distinct from "taxpayer"; and the form for Statement of Financial Condition and Other Information (to be filed with an offer in compromise) (Form 433), at least in its current version, expressly requests, "if proponent is not taxpayer," the proponent's name, address, and "relationship to taxpayer (partner, president, father, etc.)." But we think, in any event, that the "proponent" must be a person who submitted the offer in compromise (perhaps together with the taxpayer), not simply one who advanced or supplied the funds accompanying the offer. It is natural to interpret "proponent" as a person who proposed or made the offer, *i.e.*, an offeror. The offer, of course, is the offer-in-compromise, and a proponent would be one who made that proposal to the Internal Revenue Service. As English is normally used, it would be strained to read the word as including one who is no more than the source and owner of the money transmitted for the potential settlement. And

there would be great practical difficulties for the Government, if "proponent" were given the latter meaning, in determining precisely who owned the sums submitted with the compromise offer.

The circumstances surrounding the settlement offer in this case afford an excellent example of the practical burdens. The vehicle through which came the funds for the offer was an escrow agreement under which the plaintiff, as "Lender", gave $50,000 to the escrow agents (Schwartz & Freeman) for deposit with the Internal Revenue Service "to settle the aforesaid liabilities of the Borrowers" (the taxpayers). The alleged consideration for tendering the $50,000 was specified in a collateral agreement to the terms of which plaintiff seemingly assented orally, but which it never signed. By that agreement, plaintiff's obligation to retain the corporate taxpayer (Banner Bed Company) as its sales agent was curtailed in return for the $50,000 loan. Stating that it never finally entered into this agreement, plaintiff strenuously objects to any inferences to the contrary which may be drawn from the findings. See finding 10(b). Plaintiff alleges that, instead, the loan agreement with the taxpayers (Banner Bed Company and the Liebermans) was to become effective only if the compromise were accepted by the Government. Until then, the plaintiff contends, only a loan offer had been made, which could be revoked at any time because not supported by consideration; until then, the money belonged wholly to plaintiff and the taxpayers had no rights in it.

For the purposes of our decision, it is not necessary to pass upon these disputed questions. The point is that the existence of the dispute, in itself, adumbrates the problems which would face the defendant in determining the

true owner of the funds so as to permit their withdrawal by someone other than the offeror (or the taxpayer). When an outside person provides the funds, a multitude of potential arrangements and relationships may be created. The funds may be loaned for a specific time period or for an indefinite period ending with the acceptance or rejection of the compromise by the Government; they may be given in connection with a loan agreement providing for their unrestricted use, or they may be given only for use as a compromise offer; or there may not be a loan at all, but rather a gift or the repayment of a debt, etc. The permutations are many, and each variation may affect ownership. To determine the true owner, the Government would often have to examine the documents back of a compromise payment, and to take other steps necessary to ferret out the interested persons, the nature of the relationship, and the purpose of the transaction by which the offeror received the funds. This would be a continuing and recurrent burden, possibly a complex and protracted one. Moreover, if the Government turned out to be mistaken, it would find, not only that it had lost a good compromise offer, but that it must also repay the same amount to the actual legal owner. These are troublesome tasks and risks which the Internal Revenue Service could shoulder, if it wished, but we think that if it had done so it would have used more explicit language than the one word "proponent." *Cf. J. C. Pitman & Sons* v. *United States,* Ct. Cl., No. 302-59, decided May 10, 1963, slip op., p. 6, 317 F. 2d 366, 369-70.

For these reasons, practical and textual, we hold that "proponent", as used in this Treasury Regulation, does not go beyond an offeror and, more especially, does not

impose any duty on the Government to determine the real owner of the funds accompanying the offer.[8] Under that reading, plaintiff and the intervening escrowees have no rightful claim since neither can be deemed an offeror. The offer was signed and submitted by Banner Bed Company and the Liebermans; they also supplied the financial statements. The escrow agents were merely described as the source of the "borrowed" funds accompanying the offer; plaintiff was not mentioned at all in the offer. The submission, even as expanded to include the escrow agents' contemporaneous letter forwarding their check, said only that the money was to be returned to Schwartz & Freeman if no final action was taken by March 15, 1952 (a limitation which was later removed), or if the offer was rejected. See findings 13-14. Nothing was said about the right of Schwartz & Freeman (or the plaintiff) to withdraw the money or the offer. Nor was there any suggestion that either or both were joined as offerors; on the contrary, the escrowees' letter specifically referred to the Banner Company and the Liebermans as making the offer.

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[8] In *Dynamic Service, Inc.* v. *Granquist*, 51 A.F.T.R. 1419, 56-2 U.S.T.C. par. 9784 (D. Ore. 1956), a case similar to the one at bar, plaintiff tendered $1,000 to the Internal Revenue Service as part of a compromise offer submitted by a taxpayer whose business it was purchasing The check and offer were later returned to the taxpayer because they did not fully comply with the regulations. After the offer was revised and resubmitted by the taxpayer, plaintiff made a request for return of the $1,000, and the Internal Revenue Service refused. The court dismissed plaintiff's suit against the District Director of Internal Revenue on the ground that it did not have standing to sue since "the $1,000.00 check tendered with the offer in compromise was a payment made by the taxpayer and the $1,000.00 in dispute was for purposes of this case taxpayer's money."

It makes no difference that, as plaintiff urges, the defendant may have had sufficient actual notice in this particular case to enable it to determine the true ownership of the deposited funds, and thus to allow withdrawal by the owner. Under the regulation, as we read it, that was not the Service's obligation. It had no responsibility to delve into the underlying arrangements or to evaluate the true ownership of the funds transmitted with the compromise offer. Since it was clear on the face of the offer that plaintiff and the escrow agents were not offerors, they were likewise not "proponents" under the regulation and could not themselves withdraw the money "at any time prior to its acceptance."[9]

A fortiori, Section 7809 of the Code does not aid plaintiff and the escrowees. That provision declares that, upon "*rejection*" of a compromise offer by the Government, "the Secretary or his delegate shall refund to the *maker of such offer* the amount thereof" (emphasis added). This declaration is unavailing for two reasons. It deals only with the rejection of an offer, not with withdrawal prior to action by the Service. There was in this case no rejection by the Service; the offers, as revised, were accepted, be-

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[9] We do not find any adequate basis in the record for determining that the Internal Revenue Service in fact recognized plaintiff or the escrow agents as "proponents." Service personnel conferred with plaintiff and possibly the escrow agents, at some time or times, in the period between the making of the offer in 1951 and the attempted withdrawal by the agents in 1959. But we cannot infer from the bare fact of such consultations that the Government accepted plaintiff or the agents as proponents, or even that it recognized them as the true owner of the funds.

latedly, in 1962.[10] Also, the statute specifically designates an offeror as the recipient of the refund, not someone who may have supplied the funds but is not an offeror.

The plaintiff and the intervenors are likewise unable to recover on the basis of a contract implied in fact with the United States. Assuming that such contract came into being when the Government accepted the money, there has been no breach. In the letter accompanying the funds, the plaintiff, through its escrowees, stipulated that, if the compromise offer were accepted, the defendant was entitled to retain the money; and that, if rejected, the funds were to be returned to the escrow agents. No other conditions were stated and no other relevant condition can be implied. Since the defendant never rejected the compromise offer and it was subsequently accepted, the only pre-conditions to the Government's right to the funds under the implied contract have in fact been met. No breach

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[10] Plaintiff claims that the Service rejected the offer when it required the taxpayers for formal reasons, to file separate offers on half of each taxpaying group in place of a lump sum offer on behalf of all. This was not a rejection but merely advice to the taxpayers to perfect their submission in order to prevent a rejection. Nor was there a rejection of the initial offer, or a return of the funds to the taxpayers contrary to the terms of the offer, in the technical mechanics by which the original $50,000 was applied to the revised offers. See findings 22-23. The escrow agents had previously authorized the $50,000 to be applied to the separate offers; plaintiff, too, must be held to have consented, either actually or constructively. See findings 19-20.

occurred.[11] We also hold that, if such an implied contract was made, it was adequately supported by consideration; in return for the deposit, the Government agreed to consider the taxpayers' offer. But if there was no consideration, as plaintiff now says, then there was no implied agreement upon which recovery could be premised.

Plaintiff, which obviously feels that it has paid out $50,000 to benefit others but without any advantage to itself, may have a cause of action against the taxpayers (or someone else) for unjust enrichment, breach of contract, or breach of trust. But it has no claim against the defendant. The United States did not violate any pertinent statute or regulation, and it did not break any agreement with or on behalf of plaintiff (or the escrowees). The money which the Internal Revenue Service took was voluntarily proffered in satisfaction of tax liabilities admittedly owing to the United States; and the Service complied with the only conditions imposed by the compromise-offerors or by the plaintiff's own escrow agents. No rightful expectation of plaintiff's was frustrated by the Serv-

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[11] The Government did not injure plaintiff in acting on the offer in 1962. The time limit on the use of the fund had been specifically removed in 1953. In June 1957 the plaintiff and the escrowees had consented to the use of the same $50,000 in connection with the revised separate offers. By that time the money had been on deposit for almost six years, without any complaint by or on behalf of plaintiff. The money was first applied to the new offers in October 1958. The escrowees' demand on defendant came shortly thereafter in January 1959; that was the first indication of dissatisfaction by or on behalf of plaintiff. After the escrowees' demand in January 1959, there was a dispute as to their entitlement to the money. Suit here was brought on April 1, 1959. In those circumstances, the delay in action by the Service from January 1959 until July 1962 was not detrimental to plaintiff or the escrow agents.

ice's actions. In sum, the Government has not acted improperly and it has not been unjustly enriched.[12]

The plaintiff and the intervening escrow agents are not entitled to recover. The petition and the intervening petition are dismissed.

FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Robert K. McConnaughey, and the briefs and argument of counsel, makes findings of fact as follows:

1. Morgan Manufacturing Corporation (hereafter "Morgan"), International Rolling Mills Products Co. (hereafter "International"), and the plaintiff, Ralston Steel Corporation, are, or, at the times pertinent to the issues in this case, were, Illinois corporations. Banner Bed Company (hereafter "Banner") was also a corporation.

2. In December 1950, Morgan had just been formed as a wholly owned subsidiary of the plaintiff. Morris Rubin was then an officer and director of both plaintiff and Morgan. He now owns over 90 percent of the stock of plaintiff and his wife owns the rest.

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[12] For these reasons, if we were also to uphold our jurisdiction under the fourth head of jurisdiction proposed by plaintiff—the clause of 28 U.S.C. § 1491 which gives this court power to decide claims "for liquidated or unliquidated damages in cases not sounding in tort"—there could still be no recovery. If, as we hold, the causes of action based on the Code, the regulation, and implied contract have no merit, we know of no other basis for saying that the plaintiff (or the escrowees) should recover from the United States. The Internal Revenue Service did not act illegally, improperly, or unreasonably; the money was paid over voluntarily under conditions, set by plaintiff and its agents, which have been fully met; the money satisfied a debt due the Federal Government; and the United States has not been unjustly enriched.

3. In December 1950, Banner and Harry L., Herman C., Nizzie B., Eli J., and Jean Lieberman (all of whom were stockholders in Banner), were obligated to the United States for income taxes in a total amount which substantially exceeded $50,000.

4. Late in 1950, Barney Hokin, president of International, asked Rubin to have Morgan buy certain assets and liabilities of Banner. Hokin represented to Rubin that the acquisition would be a good business deal for Morgan and would be helpful to Hokin. He told Rubin that Banner had a Government contract and a lot of unfinished goods; that Banner was substantially indebted to him, Hokin, and, if the contract were not completed, he would lose a lot of money. He said Banner was facing bankruptcy, and that he preferred that it not go through bankruptcy, but that, instead, its creditors be paid off.

Rubin believed he had personal and business reasons for accommodating Hokin. He was very friendly with Hokin at that time. Moreover, he had been getting substantial quantities of steel from International, at a time when steel was hard to get. He realized no price advantage on such steel, and in some cases paid a premium for it, but he would have bought more than he did if he could have gotten it. There is no evidence, however, that Rubin, Morgan, or the plaintiff, was under any legal obligation, either to Hokin or to International.

5. (a) On December 29, 1950, plaintiff (rather than Morgan, which, having just been organized, was scarcely operative) bought some of Banner's assets, principally equipment, tools and dies, and raw materials.

(b) On January 1, 1951, plaintiff leased to Morgan, for 5 years, the furniture, fixtures, machinery, equipment, and other personal property it had bought from Banner.

6. (a) Although there is no doubt that Rubin knew Banner and the Liebermans were in financial difficulties, the evidence is not wholly clear as to whether the obligations of Banner and the Liebermans to the Government for taxes were discussed in December 1950 when plaintiff bought Banner's assets, or that Rubin knew of them then.

(b) On the date of the sale, Harry Lieberman, as secretary of Banner, executed a Vendor's Sworn Statement of Creditors, under the Bulk Sales Law, which said that Banner had no creditors. He testified at the trial, however, that, at the time the purchase documents were signed, Rubin had said he did not want to buy the stock of Banner because Banner and the Liebermans had a considerable liability to the Government and that he would buy only such assets as he wanted.

(c) Rubin testified that Hokin had told him that Banner was facing bankruptcy but he said there was no mention to him, at that time, of any obligation of Banner or the Liebermans to the Government for taxes.

(d) There is some evidence that Hokin, at least, first learned, in the summer of 1951, that the obligations of Banner and the Liebermans included substantial tax liabilities, and, on the whole of the evidence, it appears probable that regardless of whether Rubin knew of them earlier, he was not specifically concerned with arrangements for their settlement until the summer of 1951.

7. On or about July 10, 1951, at a meeting in Hokin's office, attended by Harry Lieberman and Rubin, it was decided that, since Morgan was going to continue to manufacture the bed and cot products which Banner previously had made, Morgan could use the services of the Banner-Lieberman organization to sell its products. A written contract was entered into that day between Morgan and Ban-

ner, under which Banner was appointed civilian sales agent for Morgan, for a term of 3 years. Banner was to receive a 10 percent commission on all sales of folding beds and cots, double-deck bunks, and other metal products manufactured by Morgan for sale to civilian outlets. Morgan retained the option of accepting or rejecting orders, submitted under the contract.

The contract was terminable by Morgan, whenever Morgan had paid a total of $100,000 in commissions under it.

8. Sometime before July 13, 1951, Harry Lieberman had informed Hokin that Banner and the Liebermans had a liability to the Government for income taxes, that the Government was pressing for payment, and that the Liebermans had no money with which to make a settlement.

9. Before July 13, 1951 (but apparently after July 10), Hokin called Harry Lieberman to his office, where Rubin was already present. At this meeting, Hokin told Rubin that he understood, from Lieberman, that the taxes might be compromised for $50,000, and suggested that, since the Liebermans had no funds to effect a compromise, Morgan should advance the $50,000, and that its contract with Banner might be amended to permit Morgan to cancel the contract after $50,000 in commissions had been paid to Banner instead of $100,000, as the contract then provided.

Rubin acquiesced in the proposal that Morgan advance the $50,000. Harry Lieberman called his attorney, Mr. Wolf, to have the amending document prepared. Wolf was not in his office, and Hokin then called his own attorney, Leo Schwartz, and, in the presence of both Lieberman and Rubin, instructed Schwartz to prepare a document reducing, from $100,000 to $50,000, the commissions payable by Morgan under the July 10, 1951 contract, before it could terminate the contract. Hokin told Schwartz that Morgan

would provide $50,000, to be used in connection with an offer in compromise of the Banner and Lieberman tax liabilities.

10. (a) Thereafter, at Schwartz' office (still on July 13), Harry Lieberman, Rubin, Schwartz, an officer of International named Ray, and Rubin's tax attorney, David Altman, discussed the details of the arrangements for Morgan's advance of $50,000 to be used in an effort to compromise the Banner and Lieberman tax liabilities.

At this time, Schwartz did not know that any tax liabilities were involved except those of Banner and Harry Lieberman. He did not learn, until later, when Wolf came to his office with a copy of the offer in compromise, that it was proposed to compromise also the tax liabilities of the other Liebermans.

(b) It was proposed, and apparently agreed, at the July 13, 1951 conference, that:

(1) The contract between Morgan and Banner would be amended to reduce, from $100,000 to $50,000, the amount of payments, prerequisite to Morgan's right to terminate the contract.

(2) Banner would give Schwartz a note for $50,000, payable to Morgan on or before March 15, 1952, to be held by Schwartz subject to instructions for delivery by any officer of International.

(3) Morgan would give Schwartz $50,000 for use in connection with the compromise of the tax liability subject to the terms of an escrow agreement.

(c) The escrow agreement, designating Schwartz and his partner Freeman, as escrowee, was drafted and was signed on July 13, 1951, by Rubin, as secretary of Morgan, and by Schwartz and Freeman. It mentions certain tax liabilities of "Banner Bed Co. and Harry L. Lieber-

man," referred to in the escrow agreement as the "Borrowers," and the proposed loan of $50,000 by Morgan to the "Borrowers" for the purpose of enabling the "Borrowers" to file an offer in compromise of their tax liabilities.

It says that Morgan is willing to make the loan only if the conditions of the offer in compromise are such that, if the offer is not accepted by the Treasury Department in full satisfaction of "such liabilities," the amount of the offer in compromise shall be returned to Morgan.

The operative provisions of the escrow agreement are as follows:

> 1. The Lender shall pay or cause the payment of $50,000.00 to be made to the Escrowees on the date hereof.
>
> 2. The Escrowees shall use said sum of $50,000.00 solely for the purpose of making an Offer In Compromise to the Treasury Department to settle the aforesaid liabilities of the Borrowers.
>
> 3. The Escrowees shall submit the Offer In Compromise to the Treasury Department in behalf of the Borrowers, subject to the following terms and conditions:
>
> (a) That the funds with which such Offer In Compromise is made consist of moneys which have been tentatively secured by the Borrowers under such conditions that if the Offer In Compromise is not accepted, such funds are required to be returned to the Escrowees for delivery to the Lenders.
>
> (b) That unless the Offer In Compromise is accepted by the Treasury Department on or before the 15th day of March, 1952, the amount thereof shall be returned to the Escrowees on the 15th day of March, 1952.
>
> 4. Upon the return of the funds by the Treasury Department to the Escrowees, whether upon the re-

jection of such Offer In Compromise or without final action thereon, the Escrowees shall return such funds to the Lender, and the Escrowees' duties hereunder shall thereupon cease. In the event that the Treasury Department shall accept the Offer In Compromise, the notification of such acceptance by the Escrowees to the Lender shall also cause the Escrowees' duties hereunder to cease and terminate.

(d) Also, on July 13, 1951, Morgan gave Schwartz $25,000 from its own funds and a note for $25,000, on which Schwartz raised another $25,000 from a finance company to which he endorsed the note on July 13 and which Morgan paid off shortly afterwards.

(e)) The amendment to the contract between Morgan and Banner was not fully typed during the conference and it was agreed by everyone present that it should be completed for later signature.

Schwartz asked Harry Lieberman to return to Schwartz' office to sign the contract when it was ready, and Rubin agreed that, after Harry Lieberman signed the contract, Schwartz could advance the money to be used in connection with the proposed compromise of the tax liabilities.

11. A note, dated July 16, 1951, for $50,000, from Banner to Morgan, payable on or before March 15, 1952, was delivered to Schwartz, with a letter from Harry Lieberman, also dated July 16, 1951. The letter authorized Schwartz to hold the note subject to instructions for delivery by an officer of International, and stated that, upon delivery of the note in accordance with written instructions of any such officer, Schwartz would be released from any further obligation in connection with it.

12. On July 18, 1951, Harry Lieberman returned to Schwartz' office and signed the amended contract for himself and on behalf of Banner. On that same day, Schwartz

mailed a copy of the amended contract, executed by Harry Lieberman, to Altman, Rubin's tax attorney. Rubin never signed it on behalf of Morgan and Banner never earned any commissions under it.

13. On August 7, 1951, the Collector of Internal Revenue, in Chicago,[13] received an offer in compromise, signed by Banner Bed Company, Harry L. Lieberman, Herman C. Lieberman, Nizzie B. Lieberman, Eli J. Lieberman, and Jean Lieberman, proposing to compromise their tax liabilities for $50,000. This offer included the following language:

> The following facts and reasons are submitted as grounds for acceptance of this offer: Inability to pay. The $50,000.00 offered has been borrowed. See letter to Collector from Schwartz & Freeman dated August 7, 1951, providing that if offer is rejected or if no final action is taken by March 15, 1952, the $50,000.00 shall be returned to Schwartz & Freeman.

14. (a) On August 7, 1951, Schwartz, who, by then, had learned that the proposed compromise included the liabilities of all the Liebermans, sent a letter to the Collector, enclosing a certified check for $50,000, to be used in connection with the offer in compromise submitted that day by Banner and all of the Liebermans.

The letter was as follows:

> Reference is made to the Offer in Compromise being filed contemporaneously herewith, whereby Ban-

[13] The Collector of Internal Revenue in Chicago and the District Director who succeeded the Collector in later years are referred to hereafter as the Collector, except where the operative document refers specifically to the District Director, as an individual, and in the last three findings which indicate that certain funds are now on deposit with the District Director.

ner Bed Co., Henry L. Lieberman, Herman C. and Nizzie B. Lieberman, and Eli J. and Jean Lieberman offer the aggregate sum of $50,000.00 to compromise the liabilities specified in said Offer. In connection therewith we, as escrowees, hereby tender our certified check in the sum of $50,000.00, subject, however, to the following terms and conditions:

(a) In the event the offer is accepted, the said sum of $50,000.00 shall be retained by you in full satisfaction and settlement of the liabilities specified in said offer;

(b) In the event that the offer is rejected, or in the event that no final action has been taken on such offer by March 15, 1952, the $50,000.00 shall be returned promptly to the undersigned.

Kindly acknowledge receipt of our letter and check.

(b) Schwartz testified to an uncertain recollection that Rubin authorized him "to proceed with the same $50,000 in line with the offer," but the evidence is far from clear that Rubin was aware, at that time, that the money was being used to compromise individual liabilities of the Liebermans, other than Harry.

15. (a) On December 29, 1951, plaintiff purchased from Morgan, which was then substantially indebted to plaintiff, property described in the bill of sale as follows:

* * * * * *

All goods, wares and merchandise, accounts receivable, cash on hand, and all other assets now belonging to said MORGAN MANUFACTURING CORPORATION, including but not exclusively complete inventory of raw materials, finished products, and semi-finished products, and right to return of unearned premiums on all unexpired policies of insurance, and all furniture, fixtures and equipment of every kind and nature whatsoever.

* * * * * *

(b) Thereafter Morgan was operated as a division of the plaintiff and, at some later date, was dissolved as a corporation.

16. On July 22, 1953, Schwartz sent a letter to the Collector, which eliminated the cutoff date of March 15, 1952, established in the August 7, 1951 letter, by the following statement:

> We wish to change paragraph (b) of said terms to provide as follows:
> (b) In the event the offer is rejected, the $50,000.00 shall be promptly returned to the undersigned.

Rubin had authorized Schwartz to send this letter.

17. By 1955, the Internal Revenue Service had begun to process the offer in compromise. It had been assigned for processing to a Revenue Agent named Counihan. After an investigation, he concluded that, as far as the amount was concerned, the offer was acceptable. His superior, Group Supervisor Erhart, concurred. They both believed, however, that, since it combined in one offer proposals for settlement of both corporate liabilities of Banner and individual liabilities of the several Liebermans, it was technically incorrect in form and, unless separate offers were made for each taxpaying entity, the compromise could not be recommended for acceptance. Moreover, because of the passage of time, more nearly current financial statements of the taxpayers than were then available would have to be obtained before they could recommend acceptance.

By June 15, 1957, Counihan had informed Wolf, who was attorney for Banner and the Liebermans, of these requirements.

18. On June 15, 1957, the Liebermans wrote the Collector withdrawing their original offer and requesting ap-

plication of the $50,000 to individual offers of the Liebermans, which were submitted concurrently. No new offer was submitted on behalf of Banner.

19. (a) On June 17, 1957, Schwartz received a letter from the plaintiff, authorizing him to apply the $50,000 deposited with him under the escrow agreement of July 13, 1951, in compromise of the tax liabilities of Harry L. Lieberman, Herman C. and Nizzie B. Lieberman, and Eli J. and Jean Lieberman.

The text of the letter is as follows:

> You are hereby authorized to apply the $50,000.00 deposited with you by Morgan Manufacturing Corporation, formerly an Illinois corporation, but dissolved and the assets thereof conveyed to Ralston Steel Corporation, an Illinois corporation, under the escrow agreement dated July 13, 1951 in compromise and settlement of the offers on behalf of the following:
>
> Harry L. Lieberman
> Herman C. and Nizzie B. Lieberman
> Eli J. and Jean Lieberman

(b) Rubin indicated that, in writing this letter, he thought he was merely authorizing the use of the money for compromise of the liabilities of additional individuals and did not realize that Banner was being eliminated from the offer or that the $50,000 was to be used to effectuate a compromise of only the Liebermans' individual tax liabilities. He testified, however, that Wolf told him the offer was being changed from corporate to individual and that "they wanted to change it from Banner Bed to individuals;" that he had a number of talks with Hokin about the proposed change; that Hokin had advised him to go along with it, and he did.

It is a reasonable conclusion from the evidence as a whole that, at the time, Rubin either knew what was proposed or had ample means of finding out if he had considered it important to do so, and that his letter of June 17, 1957, meant exactly what it said.

20. (a) Sometime before June 21, 1957, Schwartz was informed that amended offers were being submitted on behalf of the Liebermans and that Banner's offer was being eliminated.

(b) On June 21, 1957, Schwartz sent a letter to the Collector, authorizing the $50,000, previously deposited with the Collector, to be used in satisfaction and settlement of offers in compromise filed on behalf of Harry Lieberman, Herman C., Nizzie B., Eli J., and Jean Lieberman, with the understanding that, if the offers should be rejected, the $50,000 should be promptly returned to Schwartz and Freeman, as escrowees. The letter contained no time limit for acceptance of the offers by the Collector.

21. By a letter dated September 30, 1958, the Collector answered the Liebermans' letter of June 15, 1957, indicating that the $50,000 would be applied to the Liebermans' individual offers.

22. As a means of accomplishing the application of the $50,000, received in connection with the original offers, which included Banner, to the new, exclusively individual offers, the Internal Revenue Service drew a check for $50,000, dated October 21, 1958, payable to Banner and the Liebermans. This check was sent to a Revenue Agent named Schirmer in Chicago.

23. On October 28, 1958, Harry Lieberman, Herman C. and Nizzie B. Lieberman, Eli J. and Jean Lieberman (some of whom had returned from Florida for the purpose be-

cause they understood the check could not leave Schirmer's possession), assembled, by prearrangement, in Schirmer's office in Chicago, with their attorney, Wolf. There, each of them endorsed the check, which bore, on its reverse side, the following typed blank endorsement form:

Payable to the District
Director of Internal Revenue
Banner Bed Company
By .....
(President)
.....
.....
.....
.....
.....

None of them had possession of the check except to the extent necessary to affix his or her signature.

At that time they also furnished to the Internal Revenue Service current financial statements to accompany their individual offers.

After the check was endorsed, Schirmer sent it to the Government cashier.

24. Plaintiff's balance sheet, as of January 1, 1957, filed with its federal income tax return for that year, contains no specific reference to either an account or note receivable for the $50,000, advanced by Morgan to be used in connection with the offer in compromise, nor does it contain any other asset classification sufficient, in numerical amount, to reflect specifically the existence of the $50,000 loan as an asset.

25. On January 21, 1959, plaintiff served written demand on Schwartz and Freeman, as escrowees, requesting

that they demand the return of the $50,000 from the United States Treasury Department.

26. Schwartz & Freeman addressed a letter dated January 26, 1959, to the Collector, making the demand which the plaintiff had requested.

27. On January 26, 1959, plaintiff served on Banner, Wolf, H. Alan Long (District Director of Internal Revenue in Chicago), Harry L. Lieberman, Herman C. and Nizzie B. Lieberman, and Eli J. and Jean Lieberman, a demand for the $50,000 which had been tendered to the Collector in conjunction with the offer in compromise proposed by Banner and the Liebermans.

28. On January 28, 1959, the Liebermans served a notice upon the Collector that neither the plaintiff nor Schwartz & Freeman was entitled to a return of the $50,000 held by the Collector for the offers in compromise on behalf of the Liebermans.

29. The original petition in this case was filed April 1, 1959. Thereafter, on December 21, 1959, in compliance with instructions contained in a letter of that date to Schwartz from International, Schwartz delivered to the plaintiff, as assignee of Morgan, Banner's promissory note for $50,000, payable to Morgan, dated July 16, 1951.

30. The $50,000 has never been repaid to the plaintiff, to Morgan, or to the escrowees, Schwartz & Freeman, and remains in the defendant's possession.

31. By letter dated July 13, 1962, the Commissioner of Internal Revenue advised Mr. and Mrs. Eli J. Lieberman that their $20,000 offer in compromise (which amount is now on deposit with the District Director of Internal Reve-

nue in Chicago) was accepted, subject to this court's decision authorizing the United States to retain the funds now on deposit.

32. By letter dated July 13, 1962, the Commissioner of Internal Revenue advised Mr. Harry L. Lieberman that his $20,000 offer in compromise (which amount is now on deposit with the District Director of Internal Revenue in Chicago) was accepted, subject to this court's decision authorizing the United States to retain the funds now on deposit.

33. By letter dated July 13, 1962, the Commissioner of Internal Revenue advised Mr. and Mrs. Herman C. Lieberman that their $10,000 offer in compromise (which amount is now on deposit with the District Director of Internal Revenue in Chicago) was accepted, subject to this court's decision authorizing the United States to retain the funds now on deposit.

CONCLUSION OF LAW

Upon the foregoing findings, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff and the intervenors are not entitled to recover, and the petition and intervening petition are therefore dismissed.

APPENDIX B

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FORM 433
(REV. NOV. 1955)

U. S. TREASURY DEPARTMENT — INTERNAL REVENUE SERVICE

STATEMENT OF FINANCIAL CONDITION AND OTHER INFORMATION

(To be filed in duplicate with offer in compromise)

Submit information requested herein with your offer in compromise. If offer is based wholly or partly on inability to pay the liability. Assistance in preparation of the statement may be secured from a representative of the Office of the District Director of Internal Revenue or your tax advisor. It is important that all applicable questions be answered fully. The careful filling out of this form will expedite the consideration of your offer.

1A. NAME OF TAXPAYER	1B. SOC. SECURITY NO.	2A. NAME OF REPRESENTATIVE, IF ANY
1C. BUSINESS ADDRESS	1D. BUS. TELEPHONE	2B. ADDRESS AND TELEPHONE NUMBER
1E. HOME ADDRESS	1F. HOME TELEPHONE	

3. If proponent is not taxpayer

3A. NAME OF PROPONENT	3B. ADDRESS OF PROPONENT	3C. RELATIONSHIP TO TAXPAYER (partner, president, father, etc.)

4. Class of tax	Taxable period	Amount offered	Unpaid liability
4A.			
4B.			
4C.			
4D.			
4E.			

5. Due and unpaid federal taxes *(Except those covered by this offer in compromise)*

CLASS OF TAX	TAXABLE PERIOD	UNPAID LIABILITY
5A.		
5B.		
5C.		
5D.		

6. List names of banks and other financial institutions you have done business with at any time during past 3 years.

NAME AND ADDRESS	NAME AND ADDRESS
6A.	6B.
6C.	6D.

7. If income withholding or employment tax involved, complete 7a thru 7f inclusive

7A. WERE THE EMPLOYEES' INCOME WITHHOLDING OR EMPLOYMENT TAXES *(due from employers on wages received by them with respect to employment)* DEDUCTED OR WITHHELD FROM THE WAGES PAID DURING ANY PERIOD MENTIONED ABOVE? ☐ YES ☐ NO

7B. IF SO, WAS SUCH TAX PAID TO THE DISTRICT DIRECTOR OF INTERNAL REVENUE? ☐ YES ☐ NO

7C. IF DEDUCTED BUT NOT PAID OVER, WHAT DISPOSITION WAS MADE OF THE AMOUNTS DEDUCTED?

7D. HAS BUSINESS IN WHICH YOU INCURRED SUCH TAXES BEEN DISCONTINUED?

7E. IF DISCONTINUED, WHEN? (Date)

7F. WHAT DISPOSITION WAS MADE OF ASSETS OF DISCONTINUED BUSINESS?

8. Offer filed by individual

8A. NAME OF SPOUSE	8B. AGE OF SPOUSE	8C. AGE OF TAXPAYER

8D. DEPENDENT CHILDREN OR RELATIVES	NAME	RELATIONSHIP	AGE
(1)			
(2)			
(3)			
(4)			
(5)			
(6)			
(7)			